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10/680,365

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Chie Ohba

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EXAMINER

STEPHENS, JACQUELINE F

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UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Ex parte CHIE OHBA

Appeal 2008-1882
Application 10/680,365
Technology Center 3700

Decided: May 19, 2008

Before, TONI R. SCHEINER, DONALD E. ADAMS, and DEMETRA J.
MILLS, *Administrative Patent Judges*.

MILLS, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134. The Examiner has rejected the claims for anticipation and obviousness. We have jurisdiction under 35 U.S.C. § 6(b).

The following claim is representative.

1. An interlabial device having a body contacting surface, a garment facing surface opposing the body contacting surface, an interior region, and a periphery region which surrounds the interior region, the body contacting surface being liquid permeable, the absorbent interlabial device comprising a concave portion adapted for insertion by a user's fingers and wherein the interlabial device is configured such that substantially the entire device resides within an interlabial space of a wearer in use.

6. The interlabial device of Claim 1, wherein the interlabial device has a longitudinal length of from about 60 mm to about 150 mm and a transverse width of from about 20 mm to about 80 mm.

Reference Cited by the Examiner:

Lassen

US 4,631,062

December 26, 1986

Grounds of Rejection

1. Claims 1-5 stand rejected under 35 U.S.C. § 102(b), as anticipated by Lassen.

2. Claim 6 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Lassen.

DISCUSSION

Background

The present invention relates to absorbent devices, and more particularly to an absorbent interlabial device that is worn interlabially by

female wearers for catamenial (menstrual) purposes, incontinence protection, or both.

1. Claims 1-5 stand rejected under 35 U.S.C. § 102(b), over Lassen. We select claim 1 as representative of the rejection before us since Appellants have not separately argued the individual claims. 37 C.F.R. 41.37(c)(1)(vii).

Claim interpretation

“A determination of anticipation ... involves two steps. First is construing the claim, ... followed by a comparison of the construed claim to the prior art. This comparison process involves fact-finding, and is for the fact-finder in the first instance.” *Key Pharms. v. Hercon Labs. Corp.*, 161 F.3d 709, 714 (Fed. Cir. 1998). Accordingly, our analysis begins by construing the claimed invention, followed by a comparison of the construed claim to the prior art.

In the Specification, the term "absorbent interlabial device" refers to a “structure which includes at least one absorbent component or member, and which is specifically configured to reside within the interlabial space of a female wearer during use.” (Spec. 4: 11-17.) “When the absorbent interlabial device is properly sized for an individual wearer, more than half of the entire absorbent interlabial device of the present invention resides within such interlabial space.” (Spec. 4: 11-17.) “Preferably substantially the entire absorbent interlabial device resides within such interlabial space, and more preferably the entire absorbent interlabial device resides within such interlabial space of a female wearer during use.” (Spec. 4: 15-17.)

Thus, the Specification distinguishes between “substantially the entire” and “entire” interlabial space. From this disclosure we interpret the phrase “substantially the entire device resides within an interlabial space of a wearer in use” to mean something less than the entire device resides within the interlabial space, i.e., a portion of the device may be outside the interlabial space of a wearer in use.

The Examiner finds that

Lassen discloses an interlabial absorbent device having a liquid permeable topsheet 80 on a body facing side and a liquid impermeable backsheet 70 on a garment facing side, with an interior region 64 and periphery region (58,60,62), with an absorbent 74 disposed between the garment and body facing sides in a laminate structure (Figures 2 and 6). The interlabial device has a concave portion on the garment facing side and a convex portion on the body contacting side, the concave and convex portions are in face-to-face relationship (Figures 2 and 6). The concave portion is capable of being inserted by a user's fingers. The interlabial device is capable of fitting within an interlabial region of a user, particularly if the device is folded. As to claim 5, see Figure 6 where the concave portion is on the garment facing side.

(Ans. 4.)

In addressing the anticipation rejection, Appellant contends that “Lassen teaches away from an interlabial device configured such that substantially the entire device resides within the interlabial space of the wearer in use.” [Emphasis removed.] (Br. 4.) Appellant argues that Lassen teaches “partial labial disposition within the vestibule of the wearer” and argues that Lassen also teaches that “the forwardmost or anterior region of the pad folds beyond the vestibule about the vulva of the wearer.” (Br. 3-4.)

We are not persuaded by Appellant’s argument.

Lassen discloses that the labial pad is disposed within the vestibule of the wearer. (Lassen, col. 9, ll. 20-25.) According to Lassen the “vestibule is considered to be the region defined within the labia ... beginning at about a point lying caudally from the anterior labial commissure” (Fig. 1, element 34), “extending rearward to the posterior labial commissure” (Fig. 1, element 36) and “bounded inwardly by the floor” (Fig. 1, element 38.) (Lassen, col. 9, ll. 20-36.) It is true that Lassen’s device does extend outside of the interlabial space. However, the labial pad disclosure of Lassen still falls within the scope of the interlabial device claimed in that, as discussed herein, we have interpreted the phrase “substantially the entire device resides within an interlabial space of a wearer in use” to mean that a portion of the device may be outside the interlabial space of a wearer in use.

With respect to Appellant’s “teaching away” argument, we note that while such arguments may be presented regarding obviousness rejections, such arguments are not appropriate in an anticipation rejection.

We therefore affirm the anticipation rejection of the claims in view of Lassen.

2. Claim 6 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Lassen.

The Examiner acknowledges that Lassen does not specifically disclose the dimensions of the labial pad. (Ans. 5.) However, the Examiner finds that while Lassen does not disclose the specific dimensions of the pad, "Lassen does teach the relative dimensions in a functional sense are at least

long enough to extend over the desired areas in use (col. 11, lines 28-35).”
(Ans. 5.)

The Examiner concludes based upon the precedent of *Gardner v. TEC Systems, Inc.*, 725 F.2d 1338, 220 USPQ 777 (Fed. Cir. 1984), where the Federal Circuit held that, "where the only difference between the prior art and the claims was a recitation of relative dimensions of the claimed device and a device having the claimed relative dimensions would not perform differently than the prior art device, the claimed device was not patentably distinct from the prior art device," that the labial pad of the claimed invention is not patentably distinct from the labial pad of Lassen. (Ans. 5.)

Appellant contends, in a manner similar to that argued with respect to the anticipation rejection above, that Lassen fails to teach an interlabial device which is configured such that substantially the entire device resides within the interlabial space of a wearer in use and that has the claimed dimensions. (Br. 4.) This argument is unpersuasive for the reasons discussed above.

We further note that the Supreme Court emphasized that “the [obviousness] analysis need not seek out precise teachings directed to the subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ” (*KSR Int’l v. Teleflex Inc.*, 127 S. Ct. 1727, 1741 (2007)).

In our view, one of ordinary skill in the art reading the disclosure of Lassen of a labial pad which is generally of a size which is disposed within the vestibule of the wearer, and understanding that the claimed device would not perform differently than the labial pad of Lassen, would have considered

a labial pad having the dimensions of claim 6 to be obvious in view of the disclosure of Lassen.

Appellant argues that Lassen teaches away from the claimed invention in that Lassen teaches an interlabial pad wherein a portion of the pad extends beyond the interlabial space. A reference is said to “teach away” from a claimed invention when it “suggests that the line of development flowing from the reference's disclosure is unlikely to be productive of the result sought by the applicant” (*In re Gurley*, 27 F.3d 551, 553, (Fed. Cir. 1994)).

Lassen discloses that the labial pad is generally disposed within the vestibule of the wearer and extends over the vulva which reads on the claim language “substantially the entire device resides within an interlabial space of a wearer in use” as set forth in the Specification which also describes that a portion of the interlabial device does not reside within the interlabial space. Thus, we find no teaching away in Lassen, as alleged by Appellant.

In our view, the general disposition of the labial pad of Lassen, Lassen’s device meets the structural limitations imposed on the claimed device by the requirement that the device is “configured such that substantially the entire device resides within an interlabial space of a wearer in use” as set forth in the Specification which also describes that a portion of the interlabial device does not reside within the interlabial space.

The obviousness rejection of claim 6 is affirmed.

SUMMARY

The rejections of the claims for anticipation and obviousness are affirmed.

Appeal 2008-1882
Application 10/680,365

No time period for any subsequent action in connection with this appeal may be extended under CFR § 1.136(a).

AFFIRMED

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